SUPREME COURT OF THE UNITED STATES.

No. 290.

GEORGE P. WORK, APPELLANT,

vs.

THOMAS P. LEATHERS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF LOUISIANA.

INDEX.

	Original.	Print.
Transcript from United States district court—libel	1	1
Answer of Tho's P. Leathers	6	2
LIBELLANT'S EVIDENCE.		
George P. Work	12	4
L. W. Cooper	21	8
W. H. Phelon	23	8
W. F. Corkery	26	9
John Ruth	36	12
John Cline	38	13
John C. Sinnot	52	19
H. J. Dudley	56	21
M. I. McAdams	63	23
D. C. McCan	64	24
Testimony before the inspectors	69	26
Anthony Pauley	69	26
E. W. Baulfe	71	27
CLAIMANT'S EVIDENCE.		
John Farrell	73	28
E. W. Baulfe	77	29
Anthony Pauley	84	31
T. P. Leathers	87	33
John Janney	98	37
Ja's A. Thomson	109	41
W. Cleaves	119	45
Citation in personam	124	46
Service of same	125	47
Submission of case	125	47

	Original.	Print.
Judgment	125	47
Order allowing appeal	126	47
Appeal bond	127	48
Clerk's certificate	128	48

PROCEEDINGS IN UNITED STATES CIRCUIT COURT.

Hearing and submission of cause	130	49
Decree	130	49
Motion and order for appeal	131	49
Bond for appeal	132	49
Clerk's certificate	134	50
Citation of appeal and service	135	51

1 UNITED STATES OF AMERICA:

Circuit court of the United States, fifth circuit and district of Louisiana.

GEORGE P. WORK
vs.
THOMAS P. LEATHERS. } No. 6926.

Transcript from U. S. district court.—Filed March 3rd, 1873.

In admiralty. No. 9481.

GEORGE P. WORK
vs.
THOMAS P. LEATHERS.

Libel.—Filed July 31st, 1869.

To the honorable E. H. Durell, judge of the district court of the United States for the district of Louisiana.

The libel and complaint exhibited by George P. Work, of the city of New Orleans, in the district aforesaid, against Thomas P. Leathers, residing in the district aforesaid, in a cause of contract, civil and maritime; and hereupon the said George P. Work alleges and articularly propounds as follows:

1st. That on or about the 31st day of March, 1869, at New Or-
2 leans, within the admiralty jurisdiction of this court, libellant being the owner of the steamboat Vicksburg, did charter the said boat to the said Thomas P. Leathers for the term of two months from the date aforesaid, at and for the stipulated price of seventeen hundred and fifty dollars per month.

2d. That said Thomas P. Leathers chartered said boat for the purpose of carrying freight and passengers for hire upon the Mississippi River and its tributaries or other navigable waters, and receive' full and unlimited possession of said boat on the 31st day of March, 1869, at which time the said boat was tight, staunch, and strong, with her machinery in perfect order, and sufficiently furnished, tackled, and apparalled for the navigation for which she was intended under the contract; and the said Thomas P. Leathers contracted, stipulated, and bound himself to return the said boat to libellant at the expiration of the said term of two months, in like condition as he received her, ordinary wear and *tare* excepted, as well as to pay the aforesaid sum of seventeen hundred and fifty dollars per month.

3 3rd. That the sum of seventeen hundred and fifty dollars, stipulated to be paid by said Leathers for the first month of said term, was by him paid; but if the amount due for the second month, the said Leathers has paid only five hundred and sixty dollars, leaving a balance due of the stipulated price of eleven hundred and ninety dollars ($1,190), which the said Leathers declines to pay, though often requested so to do.

4th. That before the expiration of the second month of the said term of charter, and during the said month, while the said boat was still in possession of said Thomas P. Leathers, under said contract, and while upon a voyage from the port of New Orleans to the port of Vicksburg and back, the machinery of said boat was greatly injured and made use-

less by the breaking of a shaft and blowing out of a cylinder-head of one of her engines, and *he* wood-work greatly damaged.

5th. That the said injuries and damage, as libellant believes, were caused by and owing to the incompetency, inexperience, and negligence of the engineers employed by said Leathers and placed in charge of the engines; nor can said injuries and damage under any circum-
4 stances be classed as ordinary wear and tear, but the said Leathers was bound under his contract to repair the same at his own expense in order to place the said boat in the same condition in which he received her.

6th. That when the said Leathers had brought the said boat back to the port of New Orleans, after the voyage mentioned in article fourth of this libel, he delivered her to libellant in her then crippled condition, having refused and declined to make the repairs aforesaid, and libellant received said boat reserving his right of action against said Leathers for breach of contract and damages.

7th. That at the time the said boat was abandoned by said Leathers, the amount required to place said boat in the same condition as when delivered to him was equal to the sum of eighteen hundred and fifty dollars, for which amount said Thomas P. Leathers is indebted to libellant.

8th. That owing to the breach of contract by said Leathers, in refusing to return the said boat to libellant in the condition in which he received her, libellant was unable to use said boat, or to charter her
5 advantageously, as he could otherwise have done, but was subjected to charges for wharfage and expense of watchmen, etc., by reason of which libellant lost and was damaged to the extent of five thousand dollars, in which further sum the said Leathers is indebted to him.

9th. That, as above set forth, the said Thomas P. Leathers is indebted to the libellant in the full sum of eight thousand and forty dollars ($8,040).

10th. That all and singular the premises are true. Wherefore libellant prays that process in due form of law may issue, according to the course of courts of admiralty; that Thomas P. Leathers be cited to appear and answer all and singular the matters so articually propounded; and that this honorable court would be pleased to condemn the said Thomas P. Leathers to pay unto libellant the sum of eight thousand and forty dollars and costs, and to grant such other aid and relief to libellant as to law and justice shall appertain.

(Signed) GEO. P. WORK.
(Signed) THO. HUNTON,
Proctor for Libell't.

6 Sworn to and subscribed before me this thirty-first day of July, 1869.

(Signed) K. LOEW,
U. S. Commissioner.

Answer of Thomas P. Leathers.—Filed October 26th, 1869.

And now comes Thomas P. Leathers, of New Orleans, State of Louisiana, and for answer to the libel of George P. Work against him, the said Thomas P. Leathers, doth allege and propound as follows:

1st. That as to the matters and things contained in the first article of said libel, the same are therein truly set forth.

2d. That as to the matters and things contained in the second article

of said libel, the same are therein in great part falsely and untruly alleged and pleaded, for the truth and fact was and is, and this respondent alleges and propounds that this respondent the steamboat Vicksburg, for the purposes as are truly set forth in the second article of said libel, for the period of two months, beginning on the 31st day of March, 1869, for the sum of seventeen hundred and fifty dollars
7 per month. That this respondent did not receive full and unlimited possession and control of said steamboat; but that one Frank Corkery was placed on said steamboat by George P. Work, libellant, as his (libellant's) agent, and was instructed to act as steward, to manage the bar of said steamboat, and intrusted with the general control of the cabin, and to see that the said steamboat was properly taken care of and well managed; that said Frank Corkery, as the agent of libellant, remained on said vessel during the entire period respondent was running her, and respondent surrendered said vessel when she became disabled from running to said Frank Corkery, who received her as the agent of the libellant. That the machinery of the said steamboat Vicksburg was not in perfect order on the 31st day of March, 1869; that the starboard shaft of the said steamer was cracked at the time, although the defect was not apparent; that her boilers were in an unsafe condition; that the said steamboat was not seaworthy, her timbers being rolted. That there was no stipulation or
8 warranty made on the part of respondent at the time said charter was made, nor at any time, to return said steamboat "in like good order and condition."

3rd. That as to the matter and things contained in the third article of said libel, the same are therein in great part falsely and untruly alleged and pleaded, for the truth was and is, and this respondent alleges and propounds that true it is, this respondent paid said libellant seventeen hundred and fifty dollars charter-money for the month ending April 30th, 1869, as is set forth in the third article of said libel, and the further sum of five hundred and sixty dollars, the balance due libellant by respondent for the use of said steamboat—which payment is admitted in said third article—up to the time the said vessel was disabled and of surrendering her by respondent to the said Frank Corkery, agent of libellant; that the said sums were in full of charter-money due libellant by this respondent on said charter-party aforesaid.

4th. That as to the matters and things alleged and pleaded in
9 the fourth article of said libel, the same are admitted to be true, saving and excepting the allegation "that the wood-work of said steamboat was greatly damaged," whereas the same is untrue, and the truth and fact was and is that the wood-work of said steamboat was not damaged by the accident to her machinery, nor from any cause whatsoever, while this respondent was using said vessel.

5th. That as to the matters and things contained in the fifth article of said libel, the same are therein in great part falsely and untruly alleged and pleaded, for the truth and fact was and is, that the said steamboat Vicksburg, whilst in the employment of respondent, was well and skillfully managed; that the officers placed in charge of the engines and machinery of said vessel, were competent, skilful, experienced, and careful engineers; that the accident to the machinery, to wit, the breaking of the starboard shaft, and the consequent injury to the cylinder, occurred at a time when said vessel was running in smooth, deep
10 water, carrying only one hundred and ten pounds of steam; that the said steamboat, with her machinery, was being handled at the time with great caution and care, and was managed with the utmost

vigilance. And this respondent is not bound in law nor by any special agreement or contract to repair the injury and damage occurring from said accident, which resulted from no want of skill, prudence, or care on this respondent or on the part of the officers and crew engaged in navigating her; but that said breakage and damage were caused solely by the defects in the shaft as aforesaid, which defects existed at the time respondent chartered said steamboat, and which defects, as respondent verily believes, were known to libellant when he chartered said vessel to respondent.

6th. That as to the matters and things contained in article six of said libel, the same are not all true, but the fact and truth was and is, that immediately after the action aforesaid, the said steamboat returned to the port of New Orleans, and Frank Corkery, libellant's agent as aforesaid, took entire control of said steamboat Vicksburg, and re-
11 spondent had nothing further to do with her. That this respondent knows nothing of any "reservation of the right of action" as alleged in said article, but none was ever made to respondent nor to any one authorized by him to receive the same; and said libellant through his agent aforesaid took entire charge of said vessel without any reservation or objection whatsoever.

7th. That as to the matters contained in article seven of said libel respondent knows nothing, and neither confesses nor denies the same, but requires strict proof of the same.

8th. As to the matters contained in article eight of said libel, respondent knows nothing, and neither confesses nor denies the same, but respondent believes them to be untrue and requires strict proof of the same.

9th. That as to the matters contained in article nine of said libel, the same are not true. This respondent is not indebted to libellant in the sum of eight thousand and forty dollars in manner alleged and pleaded, nor in any other sum whatsoever.

10th. That all and singular the premises are true. Wherefore
12 respondent prays this honorable court would be pleased to pronounce against the libel aforesaid, and to condemn the libellant in costs, and otherwise r[illegible]t and justice to administer in the premises.

(Signed) T. P. LEATHERS.
(do) RANDOLPH SINGLETON & BROWNE,
Proctors for Respondent.

Sworn to and subscribed before me this 26th October, 1869.
(Signed) K. LOEW,
U. S. Commissioner.

The proctors offered the evidence taken for their respective clients, and on file.

Libellant's proctor offered the testimony given by Anthony Pauly and E. W. Baulfe before the inspectors, for the purpose of contradicting the testimony they gave before the commissioner.

Testimony taken before K. Loew, U. S. commissioner, May 9th, 1871.

Present, Tho's Hunton, for libellant; Randolph, Singleton and Browne, for claimant.

G. P. WORK sworn for himself, says he was in March, 1869, the registered owner of the steamer Vicksburg.

13 On 31st March, 1869, I chartered that boat to T. P. Leathers for two months, at $1,750 a month. Captain Leathers paid me $1,750 for the first month's charter, and $560 on the second month. It was a verbal agreement, not in writing. Captain Leathers had spoken to me a week or two before taking possession of the boat, as to chartering her. He made an examination of the boat and reported there was some things about her decks and wood-works that wanted repairing, which when done, he would take the boat on charter for two months, at the rate of $1,750 a month. I caused the repairs to be made, and so reported to him. He went up to see the boat after she had been repaired and expressed himself satisfied. His language was, "I find your boat now in good condition." And he agreed to take her for two months, at $1,750 per month.

He remarked to me, "We have no time to write out a charter, as we" —meaning himself and me—were both going away that evening, and *that evening, and* that he would return her in the same condition he now finds her, ordinary wear and tear excepted. This occurred in

14 the presence of Frank Corkery and M'r Janney, I think. He instructed M'r Corkery, whom he had employed to remain on the boat as steward, to take charge of the boat and bring her to his usual landing, foot of Canal street, during his (Leathers') absence on the Belle Lee.

The Vicksburg was delivered to me by Capt. Leathers before the expiration of the charter. He stated that the boat had broke her shafts, and that he wished to deliver her up to me in the condition she was. I declined to receive her. He then sent me word that should I decline to receive her he would abandon her. I then told him that I would receive her under protest, reserving my claim for the balance of the charter for damages. He offered to pay me the balance of the charter-money provided I would release him from damages, which I refused.

Frank Corkery never was authorized by me to receive the boat, neither did he receive her. After I had received her I got Corkery to place a watchman on board.

When I chartered the boat to Leathers, Corkery was, with the

15 knowledge of Leathers, the lessee of the bar of the boat. Leathers was glad that Corkery was the lessee of the bar of the boat, and wished him to remain on board as steward. Leathers had full possession of the boat with the exception of the bar; that was leased to Corkery, which was accepted in the charter.

The Vicksburg was in as good, staunch, and tight condition when I chartered her to Leathers as any boat could be. She was under the approval of the inspectors of hulls and boilers and the insurance inspectors, and had their certificates.

The damage done to the Vicksburg while under charter to Captain Leathers were as follows: The starboard shaft broken, the cylinder-head blown out and broken off, the pitman broke, and wood-work broken.

This damage amounted to $1,800. I didn't cause the repairs to be made. I had an estimate of the damage made by competent parties. They valued it at $1,800. In my opinion it was a low estimate of the damage to the boat. I had submitted the matter to competent carpenters and iron-workers; $1,800 was the lowest estimate by any of them. Besides this, I lost the use of my boat during the balance of the season.

16 There was a fair prospect at that time for good business in the Louisville trade. I had to take her to Louisville on one wheel,

without freight or passengers, and without being able to get an insurance-risk on her, because of her disabled condition.

In the months of July and August a boat cannot be chartered on as favorable terms as in the winter.

Capt. Leathers, whom I met every Friday or Saturday, never failed to express his satisfaction in regard to the working of the boat and her machinery, and so did the engineer, M'r Pauly, and he wished to re-charter the boat, and offered $1,000, then $1,200, then $1,500 per month, which offers I all refused.

The last offer was made the last day she left under Captain Leathers' charter. The boat cost me twice as much fuel, twice as much time, and caused me, I estimate, a loss of $5,000 by reason of her bad condition.

Cross-examined:

Reserving all exceptions to the foregoing testimony as irrelevant and inadmissable under the pleadings, and especially as to his answers as an expert as to repairs, because he is neither a mechanic nor a person conversant with such matters, claimant cross-interrogates the witness:

17

As soon as the charter was made, Capt. Leathers took possession of the Vicksburg by putting Corkery in charge, and told him to have her at his berth.

Mess'rs Corkery and Janney were present when the charter was made.

The Vicksburg was four or five years old when I chartered her to Leathers. Understood she was originally called Louisville. I bought her in 1866 or 1867.

After I received the boat from Leathers I let her remain at the wharf for ten or fifteen days, and then took her to Louisville. She lay at Louisville for several months. I then removed her cabin to another boat—a new hull. Sold the old hull of the Vicksburg to the Towboat company. Got for the hull $1,000.

The machinery of the Vicksburg was sold. Sold the broken shaft for old iron. Sold the unbroken shaft to a machinist. Don't know how much I got for it. Sold the boilers also. The two cylinders were used in the new hull. Paid the machinist for the boilers and the repairs to the cylinders and machinery for the sum of $15,000.

18

The cylinder-head and everything connected with it, growing out of the damage done by the accident, could not have cost less than from $400 to $500 to repair. I never had the shaft broken in this case repaired.

Question. Did you not in making the new boat Wade Hampton use all from the Vicksburg that could be of any use and proper for the new boat?

Answer. No, sir; we did not. We used the cylinders, the chimneys, and her cabin and furniture.

Q. Why did you not use any more of the Vicksburg in making the Wade Hampton?

A. Because I wanted a shorter hull for my trade than the Vicksburg's hull was, about, of more capacity and of more boiler-power. We paid $17,000 or $16,500 for the hull of the Wade Hampton. The width of the hull of the Wade Hampton was 36 or 38 feet; her length was 227 feet; depth, 8 feet. The length of the Vicksburg's hull was 245 feet—nearly 250 feet; beam, 34 feet about; depth, 7½ feet. I had the Vicksburg in dock previous to chartering her to Leathers, within about 12 months, I think. A boat of the Vicksburg's age is not

19

Again, in *Sloman vs. Bank of England*, 14 *Simons*, 475:

"One of two trustees of a sum of stock, sold it out "under a power of attorney, to which he forged the sig- "nature of his co-trustee, and sometime afterwards "absconded.

"Held, that the Bank of England was compellable, "*in a Court of Equity*, to reinvest the stock in the name "of the trustee."

The same point was decided in the case of *Taylor vs. Midland Railway Co.*, reported in 6 *Jurist N. S.* 595, and 28 *Beavan* 287, and on appeal in 8 *House of Lords, Cases* 751.

"Railway stock was standing in the books of the "Company in the joint names of A and B. By means "of a forged transfer, executed by A, the stock was "transferred into the name of a third person. The forg- "ery and transfer were not discovered until after the "death of B:—Held, that the railway company was "liable, at the suit of B's, representatives to replace so "much of the stock as B was entitled to."

So again in *Ashby vs. Blackwell*, 2 *Eden*, 299, it was held, Lord Chancellor Nottingham deciding the case, as follows:

"A joint stock company having permitted a trans- "fer of stock under a forged letter of attorney; held, "that the company, and not the fair purchaser, should "bear the loss.

"A trustee, whether a private person or body cor- "porate, must see to the reality of the authority empow- "ering him to dispose of the trust money; for, if forged, "it is in consideration of law and equity a nullity, and "the right remains as before."

This case, it will be observed, overrules the case of *Hildyard vs. South Sea Company*, cited above on the question whether the loss falls on the Company or the purchaser.

The case of *Johnston vs. Renton*, 9 *Eq., Cases* 181, was as follows:

"Plaintiff, the owner of railway shares in two com-
"panies, took certificates from the companies, for which
"he gave receipts. In so doing he gave his address in
"one instance, at the office of the banking company, in
"the other, at a club. He deposited the certificates with
"the manager of the bank for safe custody. The
"manager fraudulently sold the shares, and forged the
"name of the plaintiff to transfer deeds of the shares.
"The companies wrote to the plaintiff, informing him
"of the transfer; and receiving in one instance no
"answer, and in the other an answer purporting to come
"from the plaintiff, but in reality forged by the manager,
"registered the shares. On bill against one of the com-
"panies and the purchaser, praying that the purchaser
"might be decreed to deliver up the certificate to the
"plaintiff, that the Company might be decreed to cancel
"the alleged transfer, and the entry of it in their books,
"to deliver to the plaintiff a stock certificate, and to
"pay him the dividend then due, and all future divi-
"dends:—Held, that the plaintiff was entitled to the
"relief prayed, but without prejudice to any question at
"law, or in equity between the Co. Defendants."

The case of *Cottam vs. Eastern Counties Railway Co.*, 1 *Johnson & Hem, Ch. Rep.* 243, was as follows:

"Trust money was invested in railway debentures made
"payable to three trustees. The debentures were left in the
"hands of A., one of the trustees, who was also al-
"lowed to receive the interest. A. forged the sig-

"natures of his co-trustees to a deed purporting to be "a transfer from the three, and delivered the debentures "with the transfer to the purchasers, who paid full value "to A, and had no notice of the forgery. They delivered "the transfer to the Railway Company, who made an entry "of it on their books, and the subsequent dividend was "paid by the Railway Company to the purchaser. On "a bill filed by the two other trustees after A had "been convicted of forgery:—Held, that the defense of "purchaser for value without notice did not apply; and "ordered that the debentures be delivered up to the "plaintiffs, and the transfer and entry thereof in the "Company's books be canceled."

In the case of *Taylor vs. the Great Indian Peninsular Railway Company*, 4 *DeGex & Jones* 559, blank transfers for the sale of 2 *l.* shares in a company were executed and delivered to a broker with instructions to sell the 2 *l.* shares owned by the plaintiff. Plaintiff also owned at the same time 20 *l.* shares, and the broker filled the blanks with the 20 *l.* shares.

"Held, that the transfer in blank was void, and "that the holder of the shares was entitled to have the "transfers delivered up and the registration in name "of purchaser restrained."

The case of the *Bank of Ireland v. The Trustees of Evans' Charities*, 5 *House of Lords' Cases* 389, was as follows:

"Trustees of a charity in Dublin, incorporated by "act of Parliament, and having a common seal, possessed "stock in the public funds, which stock was in Ireland, "registered in the Bank of Ireland. G., the Secretary of "the incorporated trustees, was allowed to have the seal "in his possession. Five several powers of attorney,

"prepared in different years, sealed with the seal of the "incorporated trustees, the due affixing of which seal was "attested by witnesses, who, (though without any fraudu- "lent intention), attested what was not true, since the seal "was affixed by the unauthorized act of the Secretary "alone, were presented to the bank and the stock was "transferred. The facts were afterwards discovered, "and G., the Secretary, was indicted and convicted. "By a power of attorney, duly execu ed, the trus- "tees then authorized C. to transfer the stock, but "the bank refused to make the transfer. An action was "brought by the trustees on this refusal. The judge "who tried the cause, told the jury that if, under the cir- "cumstances, the trustees had so negligently conducted "themselves as to contribute to the loss, the verdict "must be given for the bank. On exceptions for this "direction: Held, that it was wrong."

The case of *Lowry v. Commercial, &c., Bank, Taney* 310, is quite similar in many of its features to the cases at bar. The facts of the case were briefly as follows:

Bank stock, in the name of trustees, was improperly transferred by one of them to secure an individual debt of the trustee making the transfer, which not being paid, the stock was sold and transferred to the purchaser on the books of the bank. A bill was filed against the bank by the *cestui que trust*, who was entitled to the dividends, praying that the bank be required to pay the dividends to her. The relief prayed for was granted.

Taney, C. J., in the able opinion rendered, very fully and carefully considers most of the questions arising in these cases. I quote a part of the syllabus, but invite a careful examination of the whole case:

"The corporation whose stock is transferred, is "made the custodian of the shares, and is clothed with "power to protect the rights of every one from un- "authorized transfers. It is a trust placed in its hands "for the protection of individual interests, and, like ev- "ery other trustee, it is bound to execute the trust with "proper diligence and care; and is responsible for any "injury sustained by its negligence or misconduct.

"As the corporation appoints the officers before "whom the transfers of stock must be made, it is "responsible for their acts, and must answer for their "negligence or default, whenever the rights of a third "person are concerned.

"The complainant's claim being merely for divi- "dends on the stock and not for the stock itself, and this "court's jurisdiction over the case being based on the alien- "age of the complainant, it can not do what the facts "would otherwise warrant and decree in favor of those of "the defendants who are entitled to the stock after the "complainant's death; although the court would be au- "thorized to do so if the complainant's interests re- "quired it."

In the case of *Sewall v. Boston Water Power Co.*, 4 *Allen*, 277, it was decided that:

"If the owner of a certificate of shares in a corpo- "ration sells a portion of them and executes and delivers "an assignment thereof, by partially filling up a blank "form, which is printed for that purpose upon the back "of the certificate, and is guilty of no want of care in the "mode of filling up the same, and the assignment is after- "wards altered so as to purport to assign the whole of "the shares, and the corporation negligently and care- "lessly assign and transfer and issue new certificates to "others for the whole of the shares, the corporation is

" liable to make good to the owner the amount wrong-
" fully transferred."

This case was in equity, and the relief granted was exactly the same as that granted by the Circuit Court in the cases at bar. The Court say :

" The plaintiff having demanded of the company a cer-
" tificate of one hundred and fifty shares, the amount wrong-
" fully transferred, has a right to it and to the shares repre-
" sented by it. He has also a right to the dividends which
" have been declared on these shares since they have been
" withheld from him. As it appears that the shares are
" constantly for sale in the market, the payment to him
" of their market price at the time of entering the decree
" will be a full and adequate compensation for them ; and
" an alternative decree may be entered, the plaintiff con-
" senting to it, either for the transfer to him of one hun-
" dred and fifty shares or their market value in money."

In *Pollock v. The National Bank*, 7 *N. Y.*, 274, it was decided that,

" A bank which has permitted a transfer of stock
" owned by a stockholder, upon a forged power of attor-
" ney, and has canceled the original certificates, may be
" compelled to issue new certificates, and if it has no
" shares which it can so issue, to pay them the value
" thereof."

Chew v. Bank of Baltimore, 14 *Md.*, 299, is a very interesting case. It was elaborately argued and most carefully and ably decided. A part of the syllabus is as follows :

" A bill of sale of stock, with a power of attorney
" for its transfer, executed by a *lunatic*, may be avoided
" by the lunatic in a proceeding instituted for that pur-

" pose and the *bank held responsible* for allowing the trans-
" fer to be made under such power.

" Where a bank permits a transfer of its stock to be
" made under a power of attorney it takes the risk of its
" *validity;* it is liable in case of a *forged* power, or of one
" executed by a *feme covert* or an *infant.*

" In all such cases there may be no actual fault on
" the part of the bank, yet the legal conclusion results
" from the justice and expediency, in such transactions, of
" casting the loss on those who can best provide against
" it.

" A bank may refuse to recognize the power of at-
" torney if not satisfied of its entire genuineness, and may
" require the personal attendance of the party for the pur-
" pose of determining such matters of fact as may give
" rise to disputes."

In the opinion of the Court, on page 319, is the following clear statement of the duties, rights and liabilities of corporations, arising out of their relations to the transfer of their stock.

" It is true, that transfers may be made under power
" of attorney, but this means a valid power, and the bank
" takes the risk depending on its execution. The corpor-
" ation is the custodian of the stock books, and is con-
" cerned to see that all transfers are duly made, either by
" stockholders themselves, or by sufficient authority to
" others. In case of forged powers the bank is liable,
" and so as to the acts of *femes covert* and *infants.* In all
" such instances, it may be said that everything appeared
" to be fair and plain, that the officers did not know the
" instrument was forged, or that the party was a married
" woman or an infant, yet the corporation must meet the
" consequences, because the law declares that forged in-
" struments are void, that married women are not *sui juris*,

"and that infants are incapable of contracting except in "specified cases. In all these instances, there may be no "actual fault on the part of the bank, but the legal con- "clusion results from the justice and expediency, in such "transactions, of casting the loss on those who can best "provide against it. A bank may refuse to recognize the "power of attorney if not satisfied of its entire genuine- "ness. It may require the personal attendance of the "party, for the very purpose of determining such matters "of fact as may give rise to disputes."

The cases of *Pratt Ex. v. Taunton Manufacturing Company et al.*, and *Same v. Merchants' National Bank et al.*, decided by the Supreme Court of Massachusetts, in September last, the report of which will appear in 123 Massachusetts Reports, bear so directly upon many of the issues involved in these cases, that I deem it advisable to quote extensively from a report of the cases found in IV volume of the Law and Equity Reporter, page 395.

Syllabus. "A corporation may be compelled by the "process of a bill in Equity, to issue a certificate for stock "transferred by it on a forged power of attorney.

"Questions arising between defendants, will not be "determined on the demand of the plaintiffs."

Abstract of Opinion by Gray, C. J.

"The plaintiff was the owner of shares in each of "the defendant corporations, and held certificates "therefor, which were taken from her house without her "knowledge, and, together with a forged power of attor- "ney, in her name to the corporation, delivered to W. M. "Field & Company, brokers, for sale. Field & Company "employed Hawes & Henshaw, stock auctioneers, to sell "the shares by auction, and they sold them accordingly.

"Field & Company, afterwards presented the certificate "and power of attorney in the one case, to the clerk of the "corporation, duly empowered to make transfers, and in "the other case, to the cashier of the bank, and obtained "from each, a transfer of the stock and a new certificate, "with a new number, in the name of Hawes & Henshaw, "and delivered it to them, and Hawes & Henshaw deliv- "ered and assigned the new certificate to the purchaser in "each case, who thereupon paid to them the sum for which "he had bid off the stock, which was its fair market value, "and they paid the same, less their commission, to Field "& Company. The purchaser surrendered the new cer- "tificate to the corporation who thereupon issued to him "another certificate, which he now holds. Neither Hawes "& Henshaw, nor the purchaser, had any knowledge, un- "til after the transfer and issue of the certificate to him, "that the plaintiff ever owned the shares; and the pur- "chaser did not see any certificate of the stock, until he "paid for the one issued to him. The plaintiff brings a "bill in equity against each of the corporations and the "purchasers of the shares therein, praying that the latter "may be ordered to surrender his certificate to the corpo- "ration to be cancelled, and that the corporation may be "ordered to issue to the plaintiff a new certificate for her "shares, and to pay to her all dividends declared, or to be "declared thereon to the date of the decree, and for fur- "ther relief.

"The questions reserved for our determination in each "case, by the justice before whom the hearing was had, "are:

"1st. Whether the plaintiff is entitled to the relief "prayed for in the bill.

"2d. Whether she is entitled to relief against the "defendant corporation alone, and

"3d. Whether she is entitled to relief against the "individual defendant, and if so, whether the corporation "should be ordered to pay to him the amount paid by him "for the stock in question with interest from the date of "payment, or any other amount.

"It is quite clear that the plaintiff could not be de- "prived of her stock without consent or negligence on her "part, and that the power of attorney in her name being "forged, she may maintain each of these bills to compel "the corporation to issue a certificate to her for her shares "and to pay her the dividends thereon. But the individual "defendant was a purchaser in good faith, for full consid- "eration, without knowledge or notice of the plaintiff's "title, or of the forgery, and does not hold the certificates "which she had. The immediate transfer to him was "made by Hawes & Henshaw, who then held a new cer- "tificate of stock; and the corporation, upon his surrender "of that certificate, issued to him another one. His "rights against the corporation depend upon the effect of "these certificates, and the plaintiff is clearly entitled to "no decree against him. If he had claimed under a trans- "fer, which he knew, or was bound to know, to be forged "or invalid, a different case would have been presented. "The relief given to the plaintiff does not require or in- "volve the decision of any question between the defend- "nts, and the Court, unless by consent, does not and can "not decidea such a question so as to bind the defendants "as against each other, but leaves it to be settled in a "proper suit between them."

See also Marsh v. Keating, 2 *Cl. & Fin.* 250;

Orr v. Union Bank of Scotland, 1 *McQueen*, 513;

Duncan v. Luntley, 2 *Mc. & G.* 30;

Shaw v. Spencer, 100 *Mass.* 382;

Cohen v. Gwynn, 4 *Md. Ch. Dec.* 357;
Farmers &c. Bank v. Wayman and Stockett, 5 *Gill.* 336;
Dalton v. Midland Railway Company, 22 *Eng. L. & Eq.* 452;
Swan v. North British &c. Co., 7 *Hurl. & Nor.* 603;
Swan ex parte, 7 *C. B.* (*N. S.*) 400; 2 *Hurl. & Colt.* 175;
Magwood v. Railroad Bank, 5 *S. C.* 379;
Angell and Ames on Corp. Secs. 564 *and* 582 *to* 585 *inclusive*;
Lindley on Part. & Cos. (3 *Eng. Ed.*) 317, 727 *and* 819;
Weaver v. Barden, 49 *N. Y.* 286;

The unbroken line of decisions both in England and the several courts of this country are to the effect that one who is once a stockholder in a corporation cannot be divested of his stock except by sale and transfer made by himself, or by such conduct on his part as estops him from denying that he sold and transferred it. A forged transfer gives no better title than that acquired by a purchase from a thief of a stolen horse.

We do not claim in this case nor is it necessary that we should show that the Telegraph Co. intended wrong by the transfer of this stock. We do not doubt that the agent making the transfer on the books of the Company, or suffering it to be made, supposed that the attorney making the transfer was acting under a valid power. But however innocent of intentional wrong the Company

may be, it is chargeable, both in law and equity with the wrong actually done. And this, as we have seen from the authorities cited, would be true if the appellees at the time of the transfer had been of full age. The question to be determined is not a question of intention but of actual consequences. It would be poor consolation indeed to say to these appellees who were mere children at the time of the pretended transfor of their stock: "We did "not know when those certificates of stock were present-"ed for transfer, that the pretended authority to execute "the transfer was false and forged, and that under a false "power we were permitting you to be robbed of your "patrimony and leaving you penniless. Had we known "all this we would not have permitted it to be done."

The liability of the Company rests upon the solid basis that it was its duty to *know* that the authority to make the transfer was genuine before it permitted the transfer. It was under no obligation to act upon any doubtful or questionable authority. It had an unquestioned right to require certain proof of the genuineness of the authority of the one who presented the certificates. Failing to require this, it acted at its peril and must make good the loss consequent upon its ill-advised act.

II.

The appellees being minors at the time of the pretended transfer of their stock certificates, would have a right to reclaim said stock from the appellant, even if the transfer were genuine. *Chew v. Bank of Baltimore, ante.*

It is hardly necessary to state in this Court that the contracts of a minor are voidable, and that one who deals

with him does so at his peril. There is the same reason for requiring a corporation to know that its stockholders are legally capacitated to execute a valid transfer as there is in requiring it to know that the power under which the transfer is made is genuine. This of course it cannot learn by an inspection of the signature, and may require proof of age. There is no presumption as to age, but in these cases the appellant was guilty of the most careless assumption of the majority of the appellees. An inspection of their own stock books would have furnished at least grounds of inquiry as to the age of the appellees. Failing to make such inquiry it must suffer the consequences.

III.

The appellees are entitled to the relief asked in this case, by reason of the gross negligence of the appellant in making said transfer.

The appellant knew at the time the transfer was made that said certificates were issued in place of certificates of stock that had belonged to Charles Davenport, that Charles Davenport was dead and that these certificates were issued to his children. In answer to the first interrogatory attached to the bill, appellant says, "that the certificates, numbered as in said "question, were issued to Charles Davenport. They "have been surrendered, and new certifiates issued to the "*widow* and *children* of said Charles for 390 shares each."

This fact of itself was sufficient to put the appellant upon inquiry as to the age of these children, and not to have made such inquiry is, under the circumstances, gross

negligence. The necessary inference from the fact of issuing new certificates to these appellees as the *children* of Charles Davenport is, that the appellant was advised of the right to issue such new certificates as it did, and of the ages of the children, and of the one to whom dividends were properly payable. It is hardly possible that any one could be so careless of the rights of others and indifferent to his own obligations, as to fail to inform himself of such matters of fact as were indispensable to the intelligent and proper performance of a duty undertaken by him. If the appellant was ignorant of the minority of the appellees and the forgery of the transfers, it was the result of gross carelessness. The fact seems to be that the appellant did not care to know anything about the validity of the authority under which it acted. The explanation is probably to be found in the fact that the endorsement of Soutter & Co., a responsible banking firm of the city of New York, appears to be upon the certificates. If appellant preferred the endorsement of Soutter & Co., to obtaining the requisite facts, let it look to Soutter & Co., and not to these innocent children, for its indemnity. We protest against the justice and fairness of the attempt now being made to defeat these actions on the plea of ignorance and innocent mistake, when that ignorance is willful and culpable, and the mistake the result of carelessness, if not of recklessness. We insist that under all the circumstances of this case, the act of the appellant in permitting the transfer to be made is indicative of such carelessness, indeed such recklessness, as of itself entitles the appellees to the relief granted by

the Circuit Court. It is not claimed either in the pleadings or evidence that any efforts or inquiries were made to ascertain either the ages of the appellees, or the genuineness of the powers of attorney, before making the transfers.

The presumption is, that if any attempt to ascertain the facts had been made, they would have been successful. This neglect of the appellant may be properly characterized *gross*.

IV.

The guardian of the appellees had no power to sell or transfer said shares of stock, except under the order of the Probate Court.

The provision of the Statutes of Ohio on this subject is as follows :

"That the executor or administrator of any deceased "person, or guardian, within this State, may sell, either "at public or private sale, any railroad or other stocks "which may have come into his hands as such executor, "administrator, or guardian, under the order of the "Probate Court of the proper county, and if sold at "private sale, at a sum not less than shall be fixed by "order of said Court." *Statutes of Ohio, Swan and Sayler*, 357.

Without the power conferred by an order of the Probate Court of Hamilton County, Ohio, any attempted sale and transfer of this stock by the guardian would have been ineffectual to pass title. Even if the guardian had been authorized to sell and transfer these shares of stock, she could not have delegated this power to another. The

fiduciary character of her relation to her wards precluded her from delegating any of her powers as such guardian to another party. *Story on Agency, Sec.* 12 *et seq.*

There is no evidence in this case that the guardian either sold or authorized the sale and transfer of this stock, but it has been claimed that she was negligent in permitting her brother, Robert W. Richey, to have access to the box in which the certificates of stock were kept, thus enabling him to perpetrate the wrong done, and that such negligence should preclude the appellees from obtaining the relief asked in these cases. Richey's access to the box was permitted by the guardian for no purpose in the remotest degree connected with those certificates of stock, and the charge of negligence against the guardian is wholly without foundation. But if she had been guilty of gross negligence, her negligence certainly could give no better title than a conveyance from her would have given. If it was not in her power to convey a valid title by deed, it is, we think, absurd to claim she could do so by any negligence or omission of duty as such guardian, whatever its character may be.

It seems very strange that it should be imputed as negligence to Mrs. Davenport, the mother and guardian of appellees, that she should have permitted a brother, whose character, appellant has taken pains to prove in this case, "was that of a high-toned and honorable banker" (See Dep. of Keys, Rec. p. 46), to have simply had access to the box in which these certificates were kept. It is very certain some new definition of negligence will have to be discovered, or any inference, at-

tempted to be drawn in these cases, based upon the negligence of Mrs. Davenport, will have nothing to rest upon.

V.

The relief to which the appellees were entitled was that which was asked and granted by the Circuit Court in these cases.

At the time these suits were brought, the appellees and their guardian knew very little of the facts relating to said shares of stock. The only thing they were certain of was, that each of the appellees was entitled to 390 shares of the capital stock of the appellant, and that certificates of such shares had been in the possession of the guardian, but whether such certificates had been issued in their own names, or in the name of the guardian as such guardian, they did not know, nor did they know how such certificates of shares had been disposed of. They knew the appellant refused to recognize them as entitled to any of the shares of its capital stock, or to participate in dividends declared upom the same. It was not until the coming in of the answer to the bill, that they were advised of the real facts affecting their cases. The bill in each case, with the interrogatories attached, is in the form, under the Ohio practice, of a bill in equity for discovery and relief. A court of equity is, we submit, the only court that can grant full and adequate relief. It is doubtless true that the appellees might have recovered their dividends by a proceeding at law, as the legal title to their stock had never passed out of them, but this would have involved the bringing of a new suit

for each successive dividend, and one of the most familiar grounds of equity jurisdiction is to prevent multiplicity of suits. And further, these appellees are entitled to have restored to them the *evidence* of the fact that they each own 390 shares of the capital stock of appellant, and to appear upon its books as the owners of such stock. In short, they are entitled to be fully restored to all that they have lost. It may be, and we think is, true that if the appellant had been known to have had shares of stock that it might have used for that purpose, the appellees by a proceeding in *mandamus* might have compelled the issue to them of the shares of stock to which they were entitled. But if the appellant were not the owner of a sufficient number of shares of its stock, and had already issued the full number of shares it was authorized under its charter to issue, no court could have granted such relief, and the action must have failed. These appellees were not required to experiment, or to institute fishing suits. They had a clear right to apply to a court of equity where they could obtain full and complete redress for their grievances.

In the early adjudicated cases of this character there seems to have been considerable doubt as to the *proper* remedy, for in no adjudicated case has there been any doubt expressed that there was *a* remedy. All the more recent cases have been suits in equity, and the jurisdiction of a court of equity has in no case been denied.

In *Sloman vs. Bank of England, ante*, "Held, that the Bank of England was compellable, *in a Court of Equity* to reinvest, etc." In the opinion

annouced by the Vice-Chancellor in this case, after setting forth the duty of the bank to keep correct accounts of stock, and of all transfers, etc., which we insist corresponds with the duty of the appellant in the cases at bar, he says:

"And my opinion is, if, at any time there has been "stock standing in the name of A., and afterwards that "stock did not appear (no matter from what cause) to be "standing in his name, A. would, *prima facie*, have a "right to say: 'Let the account stand as it did on a "given day.' If it can be shown that A. himself has transferred the stock, that is an answer; but the bank account ought to be kept with regard to every individual "who ever appeared as a stock proprietor, in such a manner as to show what the account really is.

"If that be so, it follows, as a matter of course, that "relief may be had in equity, because the plaintiff in "equity has to allege against the bank, 'You are "bound by law, to be my book-keeper in respect of my "stock, and to show me the true account of it; and if "I can show that upon a given day, stock stood in my "name, and now show that it does not stand in my name, "and I have not authorized the transfer of it, you are "responsible to me—that is to say, you must make the account stand as it ought to have stood."

So in the case of *Johnston v. Renton, ante*. "On bill "against one of the companies and the purchaser, praying that the purchaser might be decreed to deliver up "the certificate to the plaintiff, that the company might "be decreed to cancel the alleged transfer and the "entry of it in their books, to deliver to the plaintiff a "stock certificate, and to pay the dividend then due, and "all future dividends:—Held, that the plaintiff was "entitled to the relief prayed."

In these cases the answer of the appellant shows that the certificates of the appellees were at the time the suit was brought, in the hands of the appellant. It is true they had been transferred on the books of the company, and apparently canceled on their face, but such pretended transfer and cancellation was wholly unauthorized and fraudulent.

That a certificate of stock is not a negotiable instrument, has been repeatedly decided, and even a transfer in blank does not make it a negotiable instrument.

In the case of *Shaw v. Spencer, ante,* it was decided that " A certificate of stock, expressed on its face to be " transferable only on the books of the company by the " holder thereof in person, or by a conveyance in writing " recorded in said books, and surrender of this certifi- " cate,' and transferred in blank upon its back, is not " a negotiable instrument."

Not being negotiable, these certificates, like any other personal property that has been stolen, or the possession of which has been wrongfully or fraudulently lost, may be followed by the rightful owner into whose soever hands it may be found, and may be reclaimed.

The discovery sought and obtained by these appellees developed the fact that these certificates, the unquestioned property of the appellees, were in the possession of the appellant, and this fact having been disclosed in the answer of the appellant, together with the further fact that said shares of stock had been transferred on the books of appellant, and new certificates had been issued for said shares, the court, being rightfully in

possession of the cause, properly proceeded to determine the whole matter in controversy.

In the case of *Russell v. Clarke's Executors*, 7 *Cranch.* 69, Chief Justice Marshall, in announcing the opinion, says: "That if certain facts, essential to the "merits of a claim purely legal, be exclusively within "the knowledge of the party against whom that claim is "asserted, he may be required in a Court of Chancery "to disclose those facts; and the court, being thus right-"ly in possession of the cause, will proceed to deter-"mine the whole matter in controversy."

In *Story's Eq. Jur., sec.* 64 *k.*, the rule is stated as ollows:

"Another rule respects the exercise of jurisdiction "when the title is at law, and the party comes into equity "for a discovery, and for a relief, as consequent on that "discovery. In many cases it has been held, that, where "a party has a just title to come into equity for a discov-"ery, and obtains it, the court will go on, and give him "the proper relief; and not turn him round to the "expenses and inconveniencies of a double suit at law. "The jurisdiction having once rightfully attached, it "shall be made effectual for the purposes of complete "relief. And it has accordingly been laid down by ele-"mentary writers of high reputation, that: 'The court, "having acquired cognizance of the suit for the purpose "of discovery, will entertain it, for the purpose of relief, "in most cases of fraud, account, accident and mistake. "The ground is stated to be the propriety of preventing a "multiplicity of suits; a ground, of itself quite reason-"able, and sufficient to justify the relief, and one upon "which courts of equity act, as a distinct ground of orig-"inal jurisdiction."

See also *Ib., Secs.* 65 *to* 74.

The evidence shows that these certificates had been marked "canceled" on the face of each. The Appellees were entitled to certificates that were not mutilated or discredited on their faces. They were entitled to such certificates of shares as theirs were prior to the time they were mutilated. They were also entitled to be reinstated on the books of the company as the owners of such shares, and a Court of Equity alone has jurisdiction to furnish such complete and adequate relief.

Gardiner, J., in deciding the case of *Pollock vs. The National Bank*, *ante*, says: "It is said that inasmuch as "the transfer was made by virtue of a forged power of "attorney, the stock is still the property of the complain- "ants. But a title to stock in the abstract, without "any legal evidence of such title, without the power of "sale or of obtaining dividends, is not the ownership "which the complainants once possessed, and of which "they have been deprived by the agents of the bank. "They held certificates; these the bank has canceled, "and instead of issuing new ones to the complainants, "it denies their right altogether. * * *

"I think the bank is bound to issue new certificates "and account for the dividends, or, if upon inquiry it "should be ascertained that it has no stock which it can "transfer to the names of the complainants, then it "should pay to them the value of the shares owned by "them, according to the prayer of the bill."

For further decisions upon this subject see cases heretofore cited, and especially,

Lowry vs. Commercial, &c., Bank;

Sewell vs. Boston Water Power Co.;

Chew vs. Bank of Baltimore;

Cottam vs. Eastern Counties Railway Co.;
Taylor vs. The Midland Railway Co.;
Pratt, Exer. vs. Taunton M'f'g. Co.

VI.

We have not yet seen the brief of the counsel for appellant, and hence are not advised of the grounds upon which they rely for a reversal of the decrees rendered in these cases in the Court below. An examination of the pleadings will show that the only issues presented are such as by the evidence are undisputed.

1st. The appellant denies that the appellees were the identical persons who owned said shares of stock, and that they were minors.

2d. Denies that the appellees ever since they received said certificates had been and still were the owners of said shares, or entitled to the dividends thereon.

3d. Denies that said transfers were made without any legal authority or right, and avers that said transfers were made by proper authority.

4th. Denies that the power of attorney, by virtue of which said transfer was made, was false, fraudulent or forged.

5th. Denies the allegations of the bill as to the manner in which said certificates were kept by the guardian.

6th. Denies that appellees are entitled to the dividends on said stock, or to have the same replaced in their names on the books of the company.

The issues thus presented it will be seen are simple issues of fact, simple denials of the allegations of the bill.

But the defenses upon which the appellant relied in the court below, and upon which, as we are advised, its counsel still rely, are wholly outside of the issues made by the pleadings.

First. Appellant claims that Soutter & Co., or the present owners of said shares of stock, should sustain this loss and should have been sued, or at least should have been joined as respondents.

As we have stated, at the time the suits were brought, the appellees were not advised that Soutter & Co. ever had anything to do with said shares of stock, and it was not until the coming in of the answers that they learned that said firm had been one of the agents through whose acts they had been made to suffer. There is no claim in the answer that it was necessary that Soutter & Co. should be made a party for the protection, or securing of any right of the appellant, so far as the same arose out of, or was affected by, any claim made by the appellees. While the answer disclosed the fact that Soutter & Co. had received most of the new certificates that had been issued in lieu of the certificates of the appellees, that firm had not received all such shares in the first instance, and in answer to the seventh interrogatory appellant says:—"Said stock has since been transferred to other parties, "and defendant has not yet been able to trace same to "present owners." The stock then not being in the hands of Soutter & Co., what purpose could have been subserved by making that firm a party? It may be that the appellees could have recovered in an action against Soutter & Co. for the fraudulent conversion of their

stock, but it is not necessary to determine whether they could or not. It is no answer for the appellant to say that another party is also responsible to the appellees. Whether the loss must ultimately fall upon the appellant or upon Soutter & Co., or upon whom it must fall, is a matter of no concern to the appellees, nor are they to be delayed in the assertion of their rights until that question can be determined. This claim of counsel for the appellant is predicated upon the dissenting opinion of Welles, J. in the case of *Pollock vs. The National Bank, ante.* It is rarely the case that the exigencies of a cause are so desperate as to drive able counsel to seek shelter under a dissenting opinion of a single judge in a Court where six judges sat. But this might be in a measure justifiable, if the dissenting opinion were well considered and supported by either reason or authority.

After asserting that parties, who were the owners of shares of stock that had been transferred upon a forged power of attorney, remained still the owners and emitled to the dividends upon such shares, which might be recovered in an action at law, the learned Judge says:

"If it is important for the appellants to have the "stock stand in their names upon the books of the bank, "and it becomes necessary to invoke the equitable power "of the Court to effect that object, either by having the "transfers or assignments fraudently made of the same "in their names by Andrew Pollock declared void, or by "compelling a reassignment thereof to them by their "claiming to hold the stock, and have the same regis- "tered by the bank in their name, or in any other way to "be reinstated the apparent as well as the real owners of

"such stock, the persons to whom the same was assigned "or who claim title thereto, through such fraudulent as- "signments or transfers are, of all others, most inter- "ested, and have the best right to be heard before the "Court can make any order or give any judgment in the "premises. Without having those persons before them "as parties, it would be manifestly improper to give any "judgment in the premises, which would afford the ap- "pellants any relief. Indeed, it could not be done with- "out at the same time seriously affecting the purchasers "of the stock in question."

Granting that what the learned Judge says is the correct exposition of the law, not Soutter & Co., but the present owners of the shares of stock represented by said certificates fraudulently transferred should have been made parties. Who those parties are, no one surely could know so well as the appellant, and when called upon to disclose, its answer is: "Defendant has not yet been able to trace "same to present owners." It is certainly a novel doctrine to urge in a Court of Equity, that parties who have established a clear right to equitable relief, shall be denied that relief because of a suggestion that some unknown and unnamed party or parties would be affected. The assertion of such a doctrine would, we admit, leave these appellees remediless, but we shall be more than surprised when such a doctrine obtains the sanction of a Court of Equity. A judicial anatomist cannot fail to discover at a glance, that it is a monstrosity such as was never begotten by a Court of Equity. The fallacy of the argument arises from the assumption, that certificates of shares of stock issued by a corporation, in place of certificates that

have been transferred under forged powers of attorney are subject to the same infirmity of title as existed just prior to the transfer. No doubt such certificates having upon them forged transfers, might be reclaimed by the true owner from any one having them in possession prior to the transfer upon the books of the company, and the issuance of new certificates, but new certificates having been issued, the holder has the genuine recognition of the fact, by the company, that he is entitled to the designated number of shares of its capital stock. In other words such certificates are good as against the company, and as against all the world.

Davis v. Bank of England, and other cases cited *ante.*

In such cases as these "the company, and not the "fair purchaser, should bear the loss." *Ashby v. Blackwell; Johnston v. Renton*, and other cases cited *ante.*

If the company should bear the loss, the purchasers were neither necessary nor proper parties.

Possibly Soutter & Co. may be interested in the results of these suits, but that is no reason why they should have been made parties. "Not all concerned in the sub-"ject matter respecting which a thing is demanded, but "all concerned in the very thing which is demanded, the "matter petitioned for in the prayer of the bill, in other "words the object of the suit" ought to be made parties in equity. *Story's Eq. Pleadings, sec.* 72, *et seq.*, and notes.

Soutter & Co. are not interested in the thing demanded in these cases. The prayer of the bill affects no one but the appellant. If it were sought

to require the appellant to pay to the appellees the dividends upon shares of stock apparently belonging to Soutter & Co., and to require appellant to replace such shares in the names of the appellees it would have been requisite to make them parties, had they been within the jurisdiction of the Court, but nothing of that kind is demanded. Having ceased to be the owners of the shares of stock transferred to them, Soutter & Co. are in no way concerned about the object of these suits.

Again, it is nowhere shown, and is not the fact, that Soutter & Co. were within the jurisdiction of the Court, and, being out of the jurisdiction of the Court, they would not be required to be made parties, even if affected by the decree. But the decree in these cases requires nothing of Soutter & Co., and it does not appear that they are in any manner affected by it.

This question was directly decided in the case of *Dalton v. Midland Railway Co.*, 22 *Eng. L. & Eq.*, 452 as follows:

"Where a company has registered what is alleged to "be a forged transfer of shares, and an action is brought "against it by the original shareholder, for dividends, "and another is threatened by the alleged transferee, the "Court will not grant an interpleader"

Maule J. "If the transfer is not forged, the com- "pany has a defense to the action; if it is, it has been "negligently registered, and the company is answerable, "not having employed a proper secretary."

If one who threatens suit will not be required to be made a party, certainly it will not be required to make one a party who makes no claim of which

the Court is advised, and the decrees in these cases will not be reversed, unless it is apparent from the record that the rights of the appellant have been prejudiced by a failure to bring the proper parties before the Court. The appellant was the only proper party to these actions, or certainly the only one yet disclosed.

Second. Another defence attempted to be made in the Court below, was that the appellees should be charged in these actions with the expense of maintenance and education.

This defense first assumed a distinctive form, as will be seen by an inspection of the record, in the decrees. It is true that a vast amount of testimony, regarded by counsel for appellees as wholly incompetent and immaterial, had been taken, but no such issue was made in the pleadings.

The maxim, *secundum allegata et probata*, is a complete answer to any claim that the Court erred in excluding such testimony. It is never error to exclude testimony that is not responsive to some issue, and the only issues the Chancellor is required to consider are such as are made by the pleadings. But suppose such an issue had been made, it would have been stricken out as wholly immaterial and foreign to the real controversy between the parties. Why should the Chancellor concern himself about the state of the account between Mrs. Davenport and R. W. Richey, neither of whom are parties to the suit? It might have been intensely interesting information, but what legal use could have been made of it in these cases, is beyond "the power of human ken." Charles Davenport, the father of these

appellees, was, in his lifetime, one of the most skilled, accomplished and trusted of the agents of appellant, but we have yet to learn, that this affords any reason why they should account to it for the cost of their maintenance and education. It might be very gratifying to a Chancellor, if a man having children to support and educate, to know what other people spend for the same purpose, and, if the information be found very satisfactory, to make a public record of it, but it would hardly be a good reason for reversing a decree because it failed to embody in it such information. The theory upon which this defense proceeds seems to be as follows: Richey fraudulently transferred the shares of stock for which the appellant is asked to account, and upon such accounting by the appellant, would be liable to account to it for the loss sustained. Mrs. Davenport, upon a statement of accounts between her and Richey would be indebted to him in some amount. These appellees are indebted to Mrs. Davenport for their maintenance and education, for which a court of equity ought to compel her to charge them, whether she is willing so to do or not, and if it shall be found that Mrs. Davenport is indebted to Richey, and that she ought to charge the appellees for their support and education, an amount equal to that indebtedness, such amount should in equity be set off against the claim of appellees. This is a fair statement of the claim. It is not pretended that any portion of the moneys received on said pretended sale was paid directly either to Mrs. Davenport or the appellees. The testimony of Mr. Keys, taken by the appellant, is that every dollar was

paid to Richey. Nor is it pretended, or if so, it is wholly unsupported by the evidence, that any portion of said proceeds ever came into the hands of Mrs. Davenport or to the use in any way of appellees.

And further, Mrs. Davenport testifies that she has never kept any account against her children, or either of them, but that she has intended what she has done for them as a gratuity. She could not therefore, if she were so disposed, collect of them anything by reason of the amounts she has so given them, and which she intended as a gift when they received it from her. If she could not recover against them, no creditor of her's can. And there is nothing in the case to show that Mrs. Davenport is not abundantly able to pay all her debts. But suppose Mrs. Davenport had been largely indebted to Richey and had no means of paying such indebtedness, could Richey, by fraud and crime, place himself in such a position as to enable him, or any one claiming through him, to invoke the aid of a Court of Equity to enforce the collection of such debt? The filthy mire of crime, fraud and forgery has not heretofore been supposed to be a fit place for one to wash, so as to enable him to come into a Court of Equity "with clean hands."

The doctrine of equitable set-off as contended for by the learned counsel of appellant has, we concede, the merit of originality. Lord Mansfield and Judge Story never thought of it as thus enunciated.

"Courts of Equity, independently of any statute, "do not exercise jurisdiction to set-off mutual discon-

" nected debts, unless where the dealings of the parties " imply it as matter of agreement, or mutual credit."

Greene vs. Darling, 5 *Mason*, 201.

" Equity follows the law in matters of set off, un- " less some peculiar equity attach to the particular transac- " tion."

Gordon vs. Lewis, 1 *Sum.* 143, 628 ;

Howe vs. Sheppard, *Ibid*, 409 ;

Gass vs. Stinson, 3 *Sum.*, 1999 ;

Story's Eq. Jur., *Vol.* 2. *Title set-off.*

Since it is not pretended that the appellant has either paid or is charged with the expense of the maintenance and education of appellees, we submit with entire confidence that it is not error to refuse to charge the appellees with such expense in these actions.

Our attention has been called to a number of the cases relied upon by counsel for the appellant. In one, *Ramsey vs. Riley, Recorder, &c.*, 13 *Ohio*, 157, it was decided that: " To maintain suit against a recorder, for " recording a forged receipt for money due on a mort- " gage, it must be shown that he knew the character of " the instrument, and, with corrupt intent, entered it " upon record."

In another, *National Bank, &c. vs. Railroad Co.*, 21 *O. S.* 221, it was decided as follows :

"The plaintiff was the equitable owner of forty " shares of the capital stock of the defendant. Certifi- " cates of stock for those shares were outstanding in the " name and possession of a third person who claimed to " be the absolute owner thereof. The books of the com- " pany showed the certificates to be in the name of such " third person. The plaintiff without returning the cer-

"tificates, made demand of the defendant for the transfer "and delivery to it of the stock, and, upon the defen- "dant's refusal to do so, brought its action against the de- "fendant for the value of the stock, making the holder "of the certificates a party defendant. Held, that upon "such state of facts, the plaintiff was not entitled to a "judgment for the value of the stock."

It will be apparent to the casual observer that neither of these cases has any analogy to the cases at bar. The points decided, and the reasoning upon which they are based, are wholly foreign to the questions involved in these cases. The other cases to which our attention has been called, are equally foreign to the contention in these cases. We are utterly unable to see their pertinency or application.

"It takes optics keen, I ween,
To see that which is not to be seen."

Conclusion.

We have doubtless considered the questions involved in these cases much more fully than is necessary, to satisfy this Court that the decrees rendered in the Court below ought to be affirmed. These questions seem to us to be so thoroughly settled, and the basis of their settlement so consonant with reason, and supported by authority, as to make it unnecessary to do more than simply state them. But the results to these Appellees consequent upon the determination of these cases, are of such vital importance, that we prefer to be amenable to the just censure of prolixity, rather than to leave unsaid one word that ought to have been spoken in their behalf. These Appellees, now but just past majority, in very early life, were bereft of

their father,and of that succor,assistance an l support which a father alone can give. That father by industry, business tact, and great energy and activity, had accumulated a large fortune for one who had scarcely reached middle life. Upon the settlement of his estate, the distributive portion of these children was the shares of stock involved in these cases. This was their patrimony, the fruits they received of the well spent life of their father. This stock was scrupulously guarded and preserved by their mother and guardian, to await such time as they should arrive at majority, when it was to be turned over to them intact, and just as it came from the executors of their father's will. But in an evil hour Satan entered into the heart of an uncle, "the only brother of their mother, and she a widow," and tempted him, and he by the commission of forgery, a crime most base, through the aid and negligent, if not reckless co-operation of the Appellant, made it necessary that they should invoke the aid of a Court of Equity, to obtain that which is their property, bequeathed to them by a generous, loving father.

It has been charged as a fault that should defeat a recovery in these cases, that their mother trusted and relied upon this uncle, her only brother. She was left a widow while still young, and as is usually the case with the wives of business men, had no experience in, and knew nothing of the modes of business. She trusted, confided in her brother, and had no reason to suspect his integrity. Was it culpable negligence, or a censurable wrong for her to do so? Must these children submit to the injury that has been done them because their mother

and guardian had the instincts and heart of a true woman? We have no fear that it will ever be established as a rule of equity that relief should be denied to minor children, because their mother reposed confidence in an only brother, whose integrity hitherto had been unquestioned, much less that such rule will be established in this the highest Court of a great, free, enlightened, Christian nation.

One of the honored members of this Court rendered the decrees from which these appeals were taken after a full, patient and careful hearing of the cases, and we confidently expect the appellees will be made happy by an affirmance of those decrees, and the restoration of their heritage.

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